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Case No:CR-2019-MAN-000468 and CR-2020-MAN-000366

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (ChD)

Date: 25th September 2020

Before Judge Halliwell sitting as a Judge of the High Court at Manchester

In the Matter of Fox Street Village Limited (in administration)
And in the Matter of the Insolvency Act 1986

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Mr Andrew Latimer (instructed by **Hill Dickinson LLP**) for Asher Miller and Henry Lan, the joint administrators of Fox Street Village Limited (in administration)
Mr Sebastian Clegg (instructed by **WE Solicitors**) for Mr Samuel Ip and Mr Mengnan Liu
Dr Michael Steiner and **Elham Alibrahim** attended remotely in person

Hearing dates: 16-17th July 2020

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APPROVED JUDGMENT

I direct that, pursuant to CPR PD 39A para 6.1, no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic

HHJ Halliwell:

(1) Introduction

1. These proceedings relate to the appointment, out of court, of Messrs Asher Miller and Henry Lan ("the Administrators"), as administrators of Fox Street Village Limited ("the Company").

2. There are four applications before the Court.

   2.1. The Administrators' application for an order authorising them to sell freehold property free from security under *Paragraph 71* of *Schedule B1* to the Insolvency Act 1986 ("the Sale Application").

   2.2. The Administrators' application for directions, under *Paragraph 63*, following decisions of the creditors to require them (1) to apply to the Court, under *Paragraph 79*, for an order providing for their appointment to cease to have effect; and (2) to resign pursuant to *Paragraph 87* ("the Directions Application").

   2.3. Pursuant to the creditors' decisions and a court order dated 15th June 2020, the Administrators' application for an order providing for their appointment to cease to have effect ("the Termination Application").

   2.4. An application by one of the creditors, Mr Samuel Ip, for an order removing the administrators from office ("the Removal Application"). This application was purportedly made under *Paragraphs 81, 88* and *95* but, in substance, it was essentially made under *Paragraph 88*.

3. In anticipation of an order providing for the current administration to cease, I have been invited to make an administration order in respect of the Company.

4. The Company was formed for the purpose of developing land on the East side of Fox Street, Liverpool ("the Property"). This is its main asset. A substantial part of the Property has only been partly developed. However, units in this part of the development have been sold. The purchasers are the Company's main creditors.

5. The principal issue in dispute is whether the Administrators should dispose of the Property as a whole to a third-party purchaser or, with a view to completion of the development, to a consortium of the purchasers. A substantial number of the purchasers are aggrieved

by the conduct of the Administrators in seeking to press ahead, as they see it, without giving them a proper opportunity to acquire the site. They also have wider concerns about the relationship between the Administrators and the debenture holder who appointed them. They thus seek to bring the administration to an end or obtain an order providing for the Administrators to be removed.

6. No creditors' committee has formally been established under the provisions of *Paragraph 57* of *Schedule B1* to the *Insolvency Act 1986*. However, it appears that a significant number of the purchasers have formed an unincorporated association, known as the Fox Street Village Investors Association ("the FSVIA"), to advance their interests and Mr Samuel Ip has identified himself in correspondence as a member of the Executive Committee.

(2) Factual sequence and procedural background

7. The Company was formed in 2014. The anticipated development encompassed 400 residential units comprised in five blocks, denoted Blocks 'A', 'B', 'C', 'D' and 'E'. This was to be achieved by converting an existing building to create Block A and constructing four new blocks of residential flats.

8. Between 16th March and 7th May 2015, the Company acquired the Property under three registered transfers and obtained planning permission to convert Block A and build Blocks B, C and D incorporating 306 new residential units. On 20th December 2016, planning permission was given for additional units on the land encompassed by Block E. Meanwhile, the development work commenced and by the end of 2017, Blocks 'A', 'B', 'C' and 'E' were complete and most of the units in each of these blocks had been sold.

9. It appears the development was initially funded from loans provided by Swainbanks Limited and Mr Rodney Swainbank. However, in August 2018, PH Invest Limited ("PHI") advanced some £650,000 to help the Company refinance and complete the development. As security, the Company separately granted PHI a fixed charge over the Property and a debenture over the Company's property, assets and undertaking. Both charges were executed as a deed and the debenture was registered, as a floating charge, by the Registrar of Companies. However, PHI failed to register the fixed charge at HM Land Registry. As a registrable disposition under *Section 27(2)(f)* of the *Land Registration Act*

2002, PHI's rights under the fixed charge can only have taken effect as an equitable interest.

10. On 22nd March 2019 Liverpool City Council issued an enforcement notice in which extensive breaches of planning control were identified. This included a failure to comply with the relevant plans and conditions in respect of car and cycle parking, site drainage, land decontamination, refuse storage, off-site highway works, acoustic insulation, amenity space and means of escape. Prohibition orders were served in respect of Blocks B, C and E demanding the cessation of occupation. The Company was required to demolish blocks B, C, D and E or make good the want of compliance. It appears that the enforcement notice has been successfully appealed owing only to procedural issues but the underlying issues about the breaches of planning control remain.

11. At this time, Block D was under construction but it amounted to no more than the shell of a building. Its foundations and structural frame were in place but there was no cladding or roofing and works of fitting out were yet to commence. The enforcement notice required the Company to demolish Block D and construct basement car parking as originally required by the planning approval.

12. By this stage, HMRC had already presented a winding up petition. On 12th April 2019, the Company circulated proposals to its creditors for a company voluntary arrangement but these were withdrawn when it became apparent that they would not be accepted by a sufficient number of creditors.

13. On 24th May 2019, Dr Michael Steiner issued proceedings in the Business and Property Courts in London ("the London Proceedings") for the appointment of administrators. He did so as a creditor of the Company on the basis that, having purchased a unit in Block E, he was entitled to monies in respect of an assured rent which were unpaid. However, Dr Steiner's application was pre-empted when, on 30th May 2019, PHI exercised its statutory power to appoint the Administrators out of court under *Paragraph 14 Schedule B1* of the *Insolvency Act 1986*. On 14th June 2019, ICC Judge Prentis made an order staying the London Proceedings on the basis that they would "stand dismissed upon the Company's exit from administration".

14. In their Joint Report and Statement of Proposals dated 23rd July 2019 ("the Administrators' Report"), the Administrators confirmed that it was not reasonably practicable to achieve the statutory purposes, in *Paragraph 3(1)(a)* and *(b)* of *Schedule B1* to the *Insolvency Act 1986,* of rescuing the Company as a going concern or achieving a better result for the creditors as a whole than if the Company was wound up. On that basis, they were under a duty to perform their functions with a view to achieving the objective in *Paragraph 3(1)(c),* namely realising property in order to make a distribution to one or more secured or preferential creditors.

15. It was recorded in the Administrators' Report that they had instructed Lambert Smith Hampton ("LSH"), an independent firm of professional valuers and auctioneers, to assist in the valuation and marketing of the Company's assets. The Administrators confirmed that "although a formal valuation of the assets has not yet been received", LSH "has indicated that value of the uncompleted block might be in the region of £500,000". They exhibited an Estimated Statement of Affairs showing that, as at 30th May 2019, the freehold property was thus estimated at £500,000 together with an "uncertain" and thus un-quantified amount, in respect of the "completed and unsold units" in Blocks A-C and E. The Administrators calculated that some £1,004,369 was owed to PHI and after accounting to them for the estimated proceeds of sale, they envisaged that there would be a shortfall of £504,369. The purchasers of units in Block D were treated as unsecured creditors. Overall, the total deficiency to creditors was estimated at £10,269,404.

16. By the time the Company was placed in administration, some of the purchasers had formed the FSVIA. This included some purchasers, who had acquired leasehold interests in the residential units of the completed blocks, and others who had contracted to purchase units in Block D. The purchasers of the unbuilt flats in Block D, who typically paid a deposit upon exchange of contracts, are entitled to purchasers' liens in respect of the airspace notionally allocated to their flat, *Eason v Wong [2017] EWHC 207 at [33]-[54].* These were generally protected by the registration of unilateral notices in priority to PHI's unregistered fixed charge.

17. By letter dated 21st February 2020, Mr Samuel Ip contacted Messrs Miller and Lan under the heading "Re Build-Out Plan". Although Mr Ip sent or purported to send the letter in

his capacity as "member of Executive Committee" of the FSVIA, at least some passages of the letter were apparently sent on behalf of purchasers of units in Block D.

18. In the letter, he stated that "Block D's buyers have very good reasons to insist that that they are secured creditors of the whole freehold" and that "as secured creditors, you need our consent or an order from the court to sell the freehold. We have told you time and again that any paragraph 71 application will be strenuously resisted". He then referred to "a Build-Out Plan" which "*we* have devised". This involved giving each Block D buyer the choice to "continue to build out…as a group" and "pay the balance under their agreements" with "practical completion of construction …by end of July 2021" or "take his/her portion of the net proceeds from sale of the freehold…"

19. Mr Ip appended to his letter a document headed "Fox Street Village – Build Out Plan" in which it appears to have been envisaged that the purchasers would be entitled to purchase the freehold for the Property as a whole for the sum of £150,000 as part of a project that was estimated to cost some £10,800,000, including some £9,000,000 for completing the building.

20. By a report dated 12th March 2020, LSH provided professional advice to the Administrators in relation to the market value and disposal of the Property and the apportionment of the purchase price. The author of the report was Mr Colin Jennings who was then a director of LSH. Having taken into consideration the outstanding planning issues and estimated costs of completing Block D – no less than £12,400,000 – Mr Jennings advised the Administrators about the steps they had taken to market the Property for sale and the offers they had received. These included an offer of £1,600.000 from MCR Management Limited ("MCR"), £1,500,000 from Britannia Group ("Britannia"), £850,000 from Elliott Group International Limited ("Elliott") and £300,000 for Block D alone from Cara Developments Limited ("Cara"). Mr Jennings also referred to Mr Ip's offer of £150,000. He recommended the Administrators to reject Cara's offer in the sum of £300,000 on the basis that a sale of the whole would achieve a greater return than a piecemeal sale. It is at least implicit that the offers were made with a view to acquisition free from the rights of the purchasers of units in Block D.

21. Mr Jennings recommended the Administrators to proceed with the offer of £1,600,000 from MCR using Platinumshaw Limited ("Platinumshaw") as a special purpose vehicle. Among the reasons given in support of this recommendation were the fact that it was the highest offer, the backing of MCR as "a long established, well capitalised and reputable property company", the uncertain market conditions and the importance of instructing building managers at the earliest opportunity. After assessing the ground rental value of the freehold, the value of the unsold flats in Block A and the offer received from Cara for the purchase of Block D, LSH apportioned the value so as to amount to £350,000 for Block A, £1,050,000 for Blocks B, C and E and £200,000 for Block D.

22. By another letter dated 12th March 2020, the Administrators' solicitors, Hill Dickinson LLP, advised Mr Ip that the rights of the Block D purchasers were limited to the flats or the airspace allocated to them and did not encompass the entirety of the Property. They observed that his offer, which involved purchasing the freehold for £150,000, was "considerably below the highest bid" and set out to identify multiple defects in Mr Ip's Plan.

23. By letter dated 17th March 2020, Dr Steiner requisitioned the Administrators to seek decisions from the creditors on two specific matters, namely whether (1) to apply to the Court, under *Para 79(1)(c)* of *Schedule B1* to the *1986 Act* for their appointment to cease to have effect, and (2) to resign pursuant to *Paragraph 87* of *Schedule B1.* Pursuant to Dr Steiner's requisition, the Administrators circulated notice of the decisions sought, together with a voting form returnable by post or email on or before 15th May. The creditors included the purchasers of units in Block D. From among the creditors who voted, a substantial majority voted affirmatively for the Administrators to apply for an order providing for their appointment to cease and for the Administrators to resign.

24. On 11th and 22nd May 2020, the Administrators respectively issued the Sale Application, under *Paragraph 71* of *Schedule B1* to the *1986 Act,* and the Directions Application under *Paragraph 63* of *Schedule B1.* The Directions Application was issued in order to provide the Administrators with guidance about the action to be taken following the creditors' decisions. Although issued on 11th May 2020, the Sale Application was initially filed on 27th March. At a hearing on 15th June 2020, I made an order requiring the Administrators to issue a formal application for an order that their appointment shall cease to have effect

so as to give effect to the creditors' decision together with directions for the respondents to issue any cross applications within a fixed time scale in anticipation that each application could be disposed of before me at a hearing on 16th-17th July 2020.

25. On 23rd June, Mr Ip issued the Removal Application in which he sought an order providing for the Administrators to be replaced by Mr Simon Campbell and, on 29th June 2020, the Administrators issued the Termination Application. The latter was issued as a formality and not on the basis that it represented the Administrators' preferred course of action.

26. Whilst four applications now arise for determination, there are three underlying issues. These require me to determine whether I should authorise the sale of the Property free from security, provide for the administration to cease or make an order removing the Administrators from office. The issues are logically separate but involve overlapping considerations. On behalf of Mr Ip, I was also invited to intervene in the London Proceedings and make a new administration order in the event that an order is first made for the appointment of the Administrators to cease to have effect.

27. At the hearing on 16th-17th July 2020, I heard submissions from Mr Andrew Latimer on behalf of the Administrators and Mr Sebastian Clegg on behalf of Mr Ip and Ms Liu, each of whom are purchaser creditors. I also heard oral submissions from Dr Steiner. Prior to the hearing, witness statements were filed from a number of witnesses, including Messrs Miller and Ip and Dr Steiner himself, together with voluminous exhibits. A substantial amount of contemporaneous documentary evidence was also adduced, most of which had initially been exhibited to the witness statements. However, in order to clarify some matters of evidence arising from issues raised by Mr Clegg, I permitted Mr Miller and Mr Jennings to give oral evidence at the hearing. Whilst their oral evidence was limited to narrow issues, I am satisfied it was factually correct.

(3) The Sale Application

28. At the outset, the Administrators were satisfied it was not reasonably practicable to achieve the statutory objectives in *Paragraph 3(1)(a)* or *(b)* of *Schedule B1* to the *1986 Act.* They determined to perform their functions with the statutory objective, in *Paragraph 3(1)(c),* of realising the Company's property "in order to make a distribution to one or more secured or preferential creditors". Having done so, they were required to

perform their functions as quickly and efficiently as possible under the provisions of *Paragraph 4*.

29. As at 7th May 2019, PHI was identified as a secured creditor in the Company's Statement of Affairs and the Company's overall indebtedness to PHI was calculated at £1,004,369. PHI's security was an equitable interest under the unregistered fixed charge of the Property and its floating charge over the Company's assets and undertaking. Since notice of appointment was filed less than 12 months after the floating charge, the same was invalid, under the provisions of *Section 245(2)* of the *Insolvency Act 1986*, save to the extent it encompassed the value of the consideration for the discharge of the Company's debts together with interest. However, no one has sought to rely on these provisions in the hearing before me and it has not been suggested that they have any bearing on the Company's equitable interest under the fixed charge.

30. According to the Company's Statement of Affairs on 7th May 2019, some £572,678 was owed to "consumer creditors" of Blocks, A, C and E and £5,913,974 was owed to "consumer creditors" of Block D. Although treated in the Statement of Affairs as unsecured creditors, the Administrators accept that, to the extent that these creditors are purchasers with the benefit of an equitable lien for part payment of the purchase price of units at the Property, they are entitled to be treated as secured creditors. This is on the basis that a purchaser of real property who pays the purchase price or any part of it prior to completion, including a payment by way of deposit, is generally entitled to such security. However, in *Eason and Sanders v Wong [2017] EWHC 209*, Arnold J confirmed that a purchaser's lien is limited to the interest he has contracted to buy. If the purchaser has contracted to buy a divided part of the vendor's estate (for example, a flat in the vendor's building), the purchaser's equitable interest is limited to the interest he has contracted to buy and does not encompass the vendor's estate as a whole. In the case of a contract for the purchase of a suite in a building that was never constructed, Arnold J thus concluded, at *Paragraph 48*, that "the subject matter of [the] contract was in effect the legal estate in the relevant airspace which would have been occupied by the Suite when constructed".

31. In the present case, it is believed that 145 purchasers are entitled to an equitable interest in units or prospective units in the development as a whole, almost all of whom have

contracted to purchase a unit in Block D. As at 5th July 2020, when Mr Miller made his seventh witness statement, five purchasers were entitled to an equitable interest in units within Blocks A-C. The remaining purchasers had apparently contracted to purchase units in Block D. Since Block D is no more than a shell, most if not all such purchasers are entitled only to an interest in the relevant airspace. However, the purchasers' equitable liens have been protected by the registration of separate notices under the Company's registered title and thus rank in priority ahead of PHI's unregistered security. Whilst the debenture was registered by the Registrar of Companies, it cannot have crystallised until after the acquisition and registration of the purchasers' equitable liens. It is also subject to the provisions of *Section 245* of the *Insolvency Act 1986.*

32. For the sake of completeness, no preferential creditors were identified in the Company's Statement of Affairs.

33. Realising the Company's property in order to make a distribution to the Company's secured or preferential creditors and thus achieve the statutory objective in Paragraph of *3(1)(c)* of *Schedule B1* plainly encompasses the disposal of the Company's interests in any property subject to prior rights or incumbrances. This includes rights of security. No doubt the Administrators can thus dispose of the Company's property subject to such rights or incumbrances. However, the Court has a statutory power to authorise an administrator to dispose of property free from rights in the nature of a security under the provisions of *Paragraph 71* of *Schedule B1* to the *1986 Act*.

34. *Paragraph 71* provides as follows.

> "(1) The Court may by order enable the administrator of a company to dispose of property which is subject to a security (other than a floating charge) as if it were not subject to the security.
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> (2) An order under sub-paragraph (1) may be made only-
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> (a) on the application of the administrator; and
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> (b) where the court thinks that disposal would be likely to promote the purpose of administration in respect of the company.

(3) An order under this paragraph is subject to the condition that there be applied towards discharging the sums secured by the security-

(a) the net proceeds of disposal of the property, and

(b) any additional money required to be added to the net proceeds so as to produce the amount determined by the court as the net amount which would be realised on a sale of the property at market value.

(4) If an order under this paragraph relates to more than one security, application of money under sub-paragraph (3) shall be in the order of the priorities of the securities.

(5) An administrator who makes a successful application for an order under this paragraph shall send a copy of the order to the registrar of companies before the end of the period of 14 days starting with the date of the order.

(6) An administrator commits an offence if he fails to comply with sub-paragraph (5) without reasonable excuse."

35. In the present case, the Administrators invite me to make an order, under *Paragraph 71*, authorising them to dispose of the Property free from the purchasers' equitable liens and PHI's equitable charge so as to promote their statutory objective of making a distribution to the purchasers and PHI as secured creditors. This is in anticipation that the transaction will be for the disposal of the whole of the Property for its full market value. Since the purchasers rank in priority before PHI, they will be entitled to be paid first from the net proceeds of sale. However, since their security is confined only to specific parts of the Property, it will be necessary to apportion their respective share of the net proceeds of sale.

36. The Administrators have made out a compelling case under *Paragraph 71* and, for the following reasons, I shall make an order authorising the Administrators to dispose of the Property as a whole.

37. The Administrators' strategy is based on the independent professional advice of LSH. They have relied, in particular, on the professional advice of Mr Jennings. Having considered Mr Jennings' report dated 12th March 2020, supplemented by his oral evidence before

me, I am satisfied that the Administrators are fully entitled to act on the basis that his advice and recommendations provide the most reasonable and practical way forward for achieving a distribution to the secured creditors within a realistic time scale on satisfactory terms.

38. Mr Jennings has identified a range of issues in connection with the Property arising from the method of construction, the breaches of planning approval, the failure to complete Block D and the statutory requirement to serve notice of the statutory right of first refusal before disposing of the reversionary estate on qualifying leasehold owners. He is also mindful of the difficulties that arise from the breaches of planning control in relation to Block D, in particular the partial construction of the building without a car park. The building is exposed to the elements in its incomplete state. Deploying his professional expertise, Mr Jennings considered the available options and concluded that, with a view to achieving a reasonable return, the Property as a whole should be marketed for disposal to "a selective number of large regional developers and investors who had expressed interest in similar complex situations in the past". The Administrators can be seen to have acted on his recommendations. As their agents, LSH received the offers to which I have referred from MCR, Britannia, Elliott and Cara and recommended the Administrators to proceed with the Platinumshaw transaction. This was on the basis that it was "the best proposal…in [financial] terms…" and "perhaps more significantly" Mr Jennings perceived that MCR, through its nominee, had the "ability to deliver on [the] transaction".

39. Mr Clegg sought to challenge this recommendation in his submissions on behalf of Mr Ip and, another purchaser creditor, Ms Mengnan Liu. He observed that, in January 2020, Mr Quintin Bull submitted an offer of £1,800,000 and Elliott submitted a revised offer of £1,850,000, both significantly higher than MCR's offer of £1,600,000. However, I have no reason to doubt Mr Miller's evidence that he pursued both offers following the expiry of an exclusivity agreement with MCR only to be advised that the offer of £1,800,000 was no longer available following the identification of additional costs and funds could not be obtained to support the offer of £1,850,000.

40. In his report dated 12th March 2020, Mr Jennings apportioned the recommended sale price of £1,600,000 to reflect the physical limitations of the purchasers' security. He concluded that £350,000 should be apportioned to Block A, £1,050,000 to Blocks B, C and

E and £200,000 to Block D. This was on the basis that "the apportioned values [were considered]…reasonable and reflective of the value of each part of the scheme were they to be offered in the marketplace on an individual basis. The offer was as a whole and the [apportionment] reflects the significant issues which are attached to this scheme…and which will require resolution by a purchaser and are therefore reflected within the price paid". The question of apportionment raises issues to which I shall return later.

41. In the same report, Mr Jennings referred to the FSVIA's proposals to acquire the freehold. However, he indicated that LSH had doubts about its ability to raise sufficient funds to support a purchase and whether it had the appropriate background and professional skills to complete the outstanding issues and, in the light of such doubts, he did not recommend the Administrators to proceed further with such proposals.

42. The FSVIA's proposals incorporated the "build-out plan" set out in a letter dated 21st February 2020 from Mr Ip to the Administrators. Under these proposals, each Block D buyer would be given the option to enter into a group for the purpose of purchasing the Property with a view to completing the construction of the building or taking their portion of the net proceeds for the sale of the freehold. They would be entitled to purchase the freehold for the Property for the sum of £150,000.

43. In my judgment, the build-out plan was an unsatisfactory and unrealistic proposal and the Administrators were fully entitled to reject it.

44. Firstly, in the light of Mr Jennings's professional advice and the offers he has received for the Property, it involves the disposal of the Company's estate for a sum substantially less than market value. There is no good reason why the Property should be sold at substantially less than market value so as to diminish the distribution to the secured creditors. No doubt, the secured creditors can be treated as a class which encompasses the purchasers themselves. However, the purchasers only have an equitable interest – notional or otherwise – in the units they have contracted to buy. This ranks in priority before PHI's security in these particular units. However, they have no rights of security in respect of the other parts of the Property. The build out plan is thus to the disadvantage of PHI which has a secured interest in the Property as a whole. It is difficult to see how it

can be implemented without unnecessarily harming the interests of the creditors as a whole; itself precluded by the provisions of *Paragraph 3(4)* of *Schedule B1.*

45. Secondly, the build out plan was based on cost estimates for the completion of the works of construction that are not satisfactorily supported by evidence. It also appears to be based on the questionable assumption that the local planning authority will be willing to permit the purchasers to build out notwithstanding the breaches of planning control following an agreement under *Section 106* of the *Town and Country Planning Act 1990*. In any event, if and to the extent that purchasers elect to opt in to the project - itself a matter for speculation - there is no evidence that the purchasers have realistic prospects of raising the funds required to purchase the Property and complete the development at a cost they have themselves quantified at £8-9,000,000 with further expense, again quantified by themselves, of up to £1,000,000 in respect of a "*Section 106* penalty and environmental issues". In this respect, the present case shares some of the features of *Williams v Broadoak Private Finance Limited [2018] EWHC 1107*, in which HHJ Hodge QC observed that, in the absence of evidence that a build-out proposal could properly be funded by a third party, such a proposal did not merit realistic consideration where the secured creditors had not agreed to release their rights. On a similar basis, Mr Jennings was more than entitled to express doubt about the build-out plan in the present case and, indeed, to doubt whether the purchasers had the appropriate background and professional skills to complete the project.

46. Based on Mr Jennings's professional valuation and to the extent that it is relevant in the application of *Paragraph 71(3)(b)* of *Schedule B1*, I am satisfied that the market value of the Company's estate in the Property is £1,600,000.

47. I am also satisfied that the Administrators' approach provides the most reasonable and practical way forward for achieving a distribution to the secured creditors and, for the reasons below, there is no good reason to terminate the administration or remove the Administrators from office.

(4) The Directions Application

48. The Directions Application was prompted by the decisions of the creditors to require the Administrators to apply to the Court for an order terminating the appointment under

Paragraph 79(2)(c) and to resign under *Paragraph 87*. In his witness statement in support of the Application, Mr Miller asked the Court for guidance about the steps to be taken in the administration on the basis that the two decisions were "contradictory and mutually exclusive".

49. Mr Miller was correct in submitting that the two decisions cannot easily be reconciled. If and once an appointment has itself ceased to have effect pursuant to an order under *Paragraph 79*, the administrator has no office from which to resign. No doubt, it would be open to the administrator to resign in advance of the hearing of his application under *Paragraph* 79 but, if he did so, he would then, in all likelihood, cease to have standing to pursue the application. Nevertheless, *Paragraph 79(2)(c)* is in mandatory terms. An administrator is required to apply for an order providing for his office to end if the company's creditors so decide. At the preliminary hearing on 15th June 2020, I thus made an order directing the Administrators to make such an application. I also made a direction requiring any cross application to be filed within a fixed time limit and listed for hearing at the same time, together with the Sale Application, on 16-17th July 2020. Mr Ip duly issued the Removal Application under this direction.

50. Having already directed the Administrators to formally apply for an order terminating the Administration under *Paragraph 79(2)(c),* the only outstanding issue on the Directions Application is how the Administrators should respond to the creditors decision that they must resign.

51. In my judgment, the Administrators are not under any duty to resign nor are they under a duty to make an application for permission to resign since there is no statutory provision requiring an administrator to resign at the request or direction of the creditors. It is thus un-necessary for them to take action in response to the creditors' decision to require them to resign.

52. *Paragraph 87(1)* of *Schedule B1* provides that an administrator may resign only in prescribed circumstances. The prescribed circumstances, in *Rule 3.62* of the *Insolvency (England and Wales) Rules 2016,* include matters such as ill-health, cessation of professional practice, conflict of interest and a change of personal circumstances. However, it is for the administrator himself to determine whether to resign on these

grounds. This is not a decision for the creditors. *Rule 3.62(2)* provides that an administrator may resign on other grounds with the permission of the court. However, the creditors cannot require the administrators to seek the court's permission to resign. If the creditors seek to have an administrator removed from office, they are entitled to apply for a court order under P*aragraph 88* as, indeed, Mr Ip has ultimately done in the present case.

(5) The Termination Application

53. By *Paragraph 79* of *Schedule B1* to the *1986 Act*, it is provided as follows.

> "(1) On the application of the administrator of a company the court may provide for the appointment of an administrator to cease to have effect from a specified time.
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> (2) The administrator of a company shall make an application under this paragraph if-
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> (a) he thinks the purpose of administration cannot be achieved in relation to the company,
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> (b) he thinks the company should not have entered into administration, or
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> (c) the company's creditors decide that he must make an application under this paragraph.
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> (3) The administrator shall make an application under this paragraph if –
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> (a) the administration is pursuant to an administration order, and
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> (b) the administrator thinks that the purpose of administration has been sufficiently achieved in relation to the company.
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> (4) On an application under this paragraph the court may-
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> (a) adjourn the hearing conditionally or unconditionally;
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> (b) dismiss the application;
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> (c) make an interim order;

(d) make any order it thinks appropriate (whether in addition to, or in consequence of or instead of the order applied for)."

54. *Paragraph 81(1)* provides for a creditor to apply for a similar order. However, by virtue of *Paragraph 81(2),* such an application "must allege an improper motive…on the part of the person who appointed the administrator".

55. In the present case, the creditors voted by a substantial majority to require the Administrators, under *Paragraph 79(2)(c),* to apply to the Court for an order that their appointment should cease. Following my order on 15th June 2020, the Administrators have thus issued the Termination Application.

56. The Company's creditors are entitled to have their views taken into consideration, particularly in a case such as this where they have exercised their statutory right to require the Administrators to apply for an order terminating the administration. In the present case, the creditors have grievances which transcend the issues about their losses following the Company's insolvency. The Administrators are perceived to have advanced the interests of PHI to the disadvantage of the purchasers and demonstrated an unwillingness to co-operate with the purchasers or, more specifically, to recognise the merits of the "build out" project. However, it is axiomatic that no such order should be made without good reason and in the present case this requires me to consider whether the appointment was made for an improper purpose, a purpose that can no longer be achieved or, perhaps, a purpose that could better be achieved in some other way.

57. There is no formal application before me for an order providing for the appointment to cease under *Paragraph 81(1).* Mr Ip purports to rely on *Paragraph 81* in support of his application for an order removing the Administrators but the relief sought is an order removing the administrators and appointing another officeholder in substitution for him. Moreover, his application does not allege an improper motive as required by *Paragraph 81(2).*

58. I was not referred to judicial guidance on the ambit and operation of *Paragraph 79(1).* The statutory jurisdiction is available where the administrator thinks the purpose of administration cannot be achieved, *Para 79(2)(a),* or the company should not have entered administration at all, *Para 79(2)(b).* It is thus available where the administrators

were not appointed for the statutory purposes set out in *Paragraph 3(1)* or the statutory purposes cannot be achieved. It is also likely to be available where, for some other reason, administration has ceased to be a suitable process in insolvency.

59. Where a company's creditors make a decision to require the administrator to apply for an order terminating the administration under *Para 79(1),* their decision obviously does not, in itself, dictate that such an order should be made. This is in the Court's discretion having regard to the circumstances as a whole taking into consideration the purposes and the operation of the administration.

60. In the present case, I am satisfied there are no substantial grounds for an order terminating the administration and, in the exercise of my statutory powers under *Paragraph 79(4)(b),* I shall refuse the Administrators' application for such an order. In the hypothetical event that Mr Ip's application was capable of amounting to an application terminating the administration under *Paragraph 81*, it would also have been unsuccessful.

    60.1. Firstly, on analysis, the original appointment was not for an extra-statutory purpose nor, to the extent that it is relevant, was it made with an improper motive. The Company was insolvent on 30th May 2019 when PHI exercised its statutory power of appointment under *Paragraph 14*. It was insolvent on a balance sheet basis. No doubt, it was also unable to pay its debts as and when they fell due. According to the Statement of Affairs, there was, by that stage, an overall deficiency, as regards creditors, of some £10,269,404 including debts of £572,628 to the purchasers of units in Blocks A-C and E, £5,913,974 to the purchasers of units in Block D, £2,651,237 to HMRC, £1,004,369 to PHI itself and £757,196 to the Company's trade and expense creditors. There was no prospect of rescuing the Company as a going concern and the Administrators were entitled to take the view it was not practicable to achieve a better result for the Company's creditors as a whole so as to satisfy the objective in *Paragraph 3(1)(b).* However, the statutory objective in *Paragraph 3(1)(c)* of realising the Property to make a distribution to the secured creditors is and was achievable and, as a secured creditor, PHI thus appointed the Administrators with a view to achieving a distribution from the assets of the Company.

60.2. Before me, Mr Clegg submitted that there are reasonable doubts about the level of the Company's overall indebtedness to PHI and it could thus be inferred that PHI appointed the administrators with the collateral motive of ensuring that the office holder did not dispute the debt. He referred, in particular, to the terms of the facility agreement between PHI and the Company and submitted that the provisions for the payment of default interest were in the nature of a penalty. However, any possibility that the payment of default interest was in the nature of a penalty is no more than a matter of speculation and there is no evidence that it featured as an issue prior to the appointment. There is no evidence PHI regarded it as an issue when it appointed the Administrators nor is there evidence that the Administrators were appointed so as to ensure the Company's overall indebtedness to PHI went unchallenged. On the hypothesis that there was such evidence, Mr Latimer submitted that, under the Administrators' current estimate of the net amount available for distribution to PHI under the Platinumshaw transaction, namely £677,307, there would be insufficient funds available to meet any of the amounts notionally payable as default interest. This involves accepting the Administrators estimate of the costs of sale. However, there is no evidence PHI appointed the Administrators for any purpose other than to achieve a distribution as a secured creditor. At the time of the appointment, HMRC had presented a winding up petition. PHI was fully entitled to pre-empt such proceedings by appointing administrators out of court with a view to achieving a better result for the secured creditors. Moreover, any continuing issues as to whether the default provisions in the loan agreement might be susceptible of legal challenge are capable of being managed in the administration without bringing it to an end. I shall deal with this aspect further when I consider the Removal Application.

60.3. On behalf of the purchasers, Mr Clegg pointed out that the Administrators initially regarded the purchasers as unsecured creditors. This is reflected in the Statement of Affairs. Having taken legal advice, however, the Administrators now accept their rights of security by virtue of an equitable lien. No doubt, the Administrators' initial stance was in error. However, in my judgment, this does not have any bearing on the propriety of the original appointment nor does it warrant an order terminating the Administration.

60.4. Secondly, for the reasons I have given, the most straightforward and practical way for the Administrators to realise the assets of the Company and obtain a substantial return for the secured creditors is to dispose of the Property as a whole free from the purchasers' equitable liens in accordance with Mr Jennings's advice and recommendations. Conversely, the build out plan will raise a comparatively modest amount for the secured creditors as a whole and I am not satisfied, on the evidence before me, that the objectives of the build-out plan can realistically be achieved in view of the nature of the attendant commitments, the planning issues and the paucity of evidence as to how the funds can be raised. In view of the fact that the statutory purposes of the administration are still achievable and, with this end, the Administrators are seeking to pursue a reasonable strategy, I can see no good reason for bringing the administration to an end notwithstanding that it is opposed by a majority of the creditors.

(6) The Removal Application

61. *Paragraph 88* of *Schedule B1* provides that "the court may by order remove an administrator from office". Although expressed in general terms, the jurisdiction to make such an order is not un-qualified. In *re St Georges Property Services (London) Ltd, Finnerty v Clark [2011] BCC 702*, Mummery LJ stated, at Para 15, that "…the court must have good grounds for making such an order". He endorsed Sir Andrew Morritt's observation that "what is good or sufficient must be ascertained by reference to the purposes of the office and the facts of the case". No doubt, this includes circumstances in which administrators are culpable for a failure to comply with their statutory functions and duties. It can also include cases in which they are exposed to an irreconcilable conflict of interest and duty, for example where it is alleged that they negotiated a pre-pack transaction for the sale of company assets at an undervalue, see for example, *Clydesdale Financial Services Ltd v Smailes [2009] EWHC 1745 (Ch)* and *VE Vegas Investors IV LLC v Shinners [2018] EWHC 186 (Ch).*

62. If administrators must themselves investigate and review their own conduct, this can be enough to warrant an order for removal. However, as Warren J noted in *Sisu Capital v Tucker [2005] EWHC 2170*, at *para 114*, it is not unusual for accountants who have previously been advising a group of creditors to be appointed as office-holders. Where

they thus become exposed to a conflict, it is necessary to consider whether the conflict can be managed without removal from office, *Sisu Capital (supra)* at *Para 108*. This can be seen in the approach taken by the Court of Appeal in *Re St Georges Property Services (London) Ltd, Finnerty v Clark [2012] BLR 594* where the administrators were appointed, out of court, by a debenture holder. When the administrators declined to take proceedings against the debenture holder on the grounds that the underlying loan was an extortionate credit transaction, Registrar Derrett made an order removing them. However, Sir Andrew Morritt, the Chancellor, allowed their appeal on the basis that there was no good reason for removal. His decision was affirmed by the Court of Appeal. The administrators had apparently taken into consideration the wishes of the unsecured creditors but decided against bringing the claim after receiving independent legal advice.

63. *Rule 3.65(1)* of the *Insolvency (England and Wales) Rules 2016* provides that an application for an order removing administrators from office under the provisions of *Paragraph 88* of *Schedule B1* must state the grounds on which the order is requested. In the present case, the application did not specify the grounds for removal otherwise than by reference to an unidentified witness statement from Mr Samuel Ip "to be served". A witness statement from Mr Ip dated 29th June 2020 was subsequently served. This did not identify the grounds for removal. However, in Paragraph 27 of his Skeleton Argument dated 15th July 2020, Mr Clegg summarised the grounds for removal in the following terms.

    63.1. "their appointment was with an improper motive and rather than bring the entirety of the administration [to] an end, the court can exercise its discretion to effect a removal and replacement;

    63.2. the conduct of the administrators generally and, in particular, as regards the sale and rushing through of the sale application justifies their removal in order than independent administrators with independent advice can be appointed; or

    63.3. their appointor, PHI, should be taking reasonable steps to remove them, but it is not, because the Administrators are fulfilling what PHI wants to get out of the administrators so Mr Ip can apply for their removal".

64. No doubt, in considering whether there are "good grounds" for removing an administrator from office, the Court can take into consideration his conduct generally. If an

appointment is made with an improper motive and the administrator colludes with the persons who appointed him to achieve it, this could also constitute good grounds for removal. However, as a general rule, the grounds for removal must arise from the conduct of the administrator or matters personal to him.

65. In the present case, many of the creditors – in particular, the purchasers of units in Block D – are aggrieved by the conduct of the Company prior to administration and they are suspicious that, having been appointed by PHI, the Administrators seek to enter into a transaction which will secure most of the net proceeds of sale for the benefit of PHI. Whilst the purchasers of units in Block D are entitled to an equitable lien in respect of their notional interest in the building, their security is limited and, when the net proceeds of sale are apportioned to reflect the value of their respective interests, their security will yield considerably less than the amount owed to PHI notwithstanding that the overall indebtedness to the purchasers of Block D is significantly higher than the debt to PHI. If the creditor purchasers have thus formed the impression that the Administrators are determined to pursue a transaction which will be to the advantage of PHI, it is not difficult to see why. Viewed from their perspective, the creditor purchasers are also aggrieved that the Administrators have declined to proceed or otherwise co-operate with them in ensuring that the development is completed so as to provide them with the opportunity to acquire the residential units they originally contracted to buy under Mr Ip's build out plan.

66. However, for the reasons I have already given, I am satisfied that the Administrators were appointed for the purpose of achieving the statutory objective in *Paragraph 3(1)(c)* of realising the Property to make a distribution to the secured creditors. They were not appointed for an improper purpose and there is no convincing evidence before me that, in making the appointment, PHI was motivated by collateral or improper considerations. Moreover, for reasons I have also given elsewhere, the Administrators' proposed transaction represents the most reasonable and practical way forward for achieving a distribution to the secured creditors within a realistic time scale on satisfactory terms.

67. Unlike *Clydesdale Financial Services Ltd v Smailes* and *VE Vegas Investors IV LLC v Shinners (supra),* the proposed transaction was not negotiated as a pre-pack. There is no evidence to suggest that it will be at an undervalue nor is there evidence to suggest the transaction

will be tainted in any other way. There is no suggestion, for example, that there is any connection between the Administrators and MCR or the Fortis Group nor, indeed, is it suggested that PHI has any such connection. The Administrators have acted in reliance upon LSH's professional advice as to the best way of marketing and disposing of the Property.

68. It is conceivable that the Administrators are at least potentially subject to a conflict arising from the fact that they were initially appointed by PHI. As administrators, it will be for them to determine how to apportion the net proceeds of sale between PHI and the purchasers. It will also be for them to consider whether the provisions in the PHI loan transaction for the payment of default interest can be challenged in some way, and, if so, whether this will affect the amounts secured by PHI's fixed charge. However, I am satisfied that any conflict can be managed, as suggested by Warren J in *Sisu Capital (supra),* without removing the Administrators from office.

    68.1. On the issue of apportionment, the Administrators have already received Mr Jennings' professional advice. Mr Jennings has apportioned the value of Block D as a whole in the sum of £200,000. This is significantly less than Cara's separate offer of £300,000. It is at least implicit in Mr Jennings' report that he had serious doubts as to whether such an amount was realistically achievable. However, in my judgment it would be a sensible precaution for this issue to be referred, for a second opinion, to an independent valuer from another firm. Moreover, when this is done, the valuer should be requested to assess whether there is any reason to value the notional interests of each purchaser other than as a rateable proportion of the building as a whole, and, if so, how to do so.

    68.2. Subject to the precise scope of the legal advice they have already received, it would also be a sensible precaution for the Administrators to obtain independent legal advice about the issues in relation to the PHI Loan. It appears from the judgment of Mummery LJ, at Para 38, in *Re St Georges Property Services (London) Ltd, Finnerty v Clark (supra)* that, in that case, specialist legal advice was obtained from two separate firms of solicitors. In the present case, the Administrators may already have received advice on the point from their solicitors in these proceedings, Hill Dickinson LLP. In any event, it appears they have obtained legal advice from Edwin Coe LLP

("Edwin Coe") about the validity of PHI's security and, more specifically, their own appointment. Edwin Coe have apparently advised them that the security is enforceable and the appointment valid. If, in giving their advice, Edwin Coe considered the provisions of the loan facility itself and the provisions for the payment of default interest, there will be no need for the Administrators to revisit the issue if Edwin Coe advised, in clear terms, that the default payment provisions were not in the nature of a penalty and PHI was contractually entitled, in full, to the amounts it claims. However, if this is not the case and there is reason to believe that the legal issues in relation to the PHI loan transaction could adversely affect the amounts secured by PHI's fixed charge, it would be sensible for the Administrators to obtain further advice on this particular issue from another firm of solicitors.

69. In his submissions before me, Dr Steiner raised additional concerns about the conduct of the Administrators. Some of these were based on the high handed and dismissive way in which they are perceived to have dealt with Mr Ip's build out plan. There is also perceived to have been a failure, on the part of the Administrators, to appreciate the understandable grievances of the purchasers – in particular, the purchasers of units in Block D - and the intensity of feeling this has generated. More generally, it was suggested the Administrators have failed to co-operate with the purchasers in a way that could reasonably have been expected. It was thus not surprising that a substantial majority of the creditors voted, in May 2020, for the Administrators to resign.

70. Whilst the creditors were not entitled to require the Administrators to resign, I have taken their views into account when considering whether to make an order for removal. I have also taken into account their perceptions about the conduct of the administration. Having done so, I am not satisfied these considerations warrant an order removing the Administrators from office.

    70.1. Firstly, the critical issue between the parties is as to the basis on which the Administrators should dispose of the Property. This issue has generated most of the acrimony between the parties. For the reasons already given, I am satisfied that, on this issue, the Administrators' strategy is sound and they are entitled to an order authorising the sale of the Property as a whole upon the basis sought.

70.2. Secondly, whilst it does appear there have been difficulties of communication between the Administrators and the purchasers for which it is likely the Administrators are at least partly culpable, it would be disproportionate for the court to make an order removing the Administrators from office on this ground alone. To the extent this remains a serious matter of concern, the creditors are entitled to establish a creditors' committee under *Paragraph 57* of *Schedule B1* of the Rules to require the Administrators to attend to provide them with information about the performance of their functions. In his submissions before me, Dr Steiner suggested that the Administrators were themselves culpable for the failure of the creditors to establish a creditors' committee. However, even now, there is nothing to preclude the creditors acting pro-actively to do so. In itself, this aspect of the case does not furnish the creditors with a good reason for removing the Administrators.

70.3. Thirdly, if and to the extent that the purchasers have specific concerns, in their capacity as creditors, about the performance of the Administrators' functions and they believe the Administrators have thus acted or intend to act so as to harm their interests, they would be entitled to apply for specific relief under the provisions of *Paragraph 74* of *Schedule B1*. However, in such circumstances, the Administrators should not be removed without first exploring the alternative possibilities.

71. Mr Ip's application for an order removing the Administrators is dismissed.

(7) Mr Ip's informal application for an administration order in the London Proceedings

72. On Mr Ip's behalf, Mr Clegg invited me to permit Mr Ip to be substituted for Dr Steiner as applicant in the London Proceedings and, having done so, to make an administration order. This was in anticipation of an order providing that for the current appointment to cease in effect under *Paragraph 79*. Since I do not intend to make such an order, it is no longer in issue.

73. However, this aspect of Mr Ip's case is misconceived. Pursuant to ICC Judge Prentis's order dated 14th June 2019, the London Proceedings are stayed. They will remain stayed until "the Company's exit from administration" at which point, it is expressly provided that they shall "stand dismissed". This order has not been set aside or appealed and the London Proceedings have not been transferred to this Court.

(8) Disposal

74. I shall thus make an order, under *Paragraph 71* of *Schedule B1*, authorising the Administrators to dispose of the Property free from security at a price of not less than £1,600,000. By virtue of *Paragraph 71(3),* the net proceeds of disposal shall be applied to the discharge of the secured sums. Consistently with the judgment of HHJ Hodge QC in *Williams v Broadoak Private Finance Limited (supra)* at *Para 36,* I am satisfied that this should comprise the proceeds of sale after deduction of all proper costs, charges and expenses reasonably incurred in the preservation and realisation of the Property as an asset in the administrations. To the extent it is relevant, I am also satisfied that £1,600,000 can currently be taken to be the market value of the Property for the purposes of *Paragraph 71(3)(b*). The parties shall each have permission to apply in the event there is a change of circumstances or, indeed, for other reasons in connection the implementation of the order.

75. Having determined that the Administrators are not under any duty to resign or apply for permission to resign, I shall make no further order on the Directions Application. However, the Termination Application is refused and the Removal Application is dismissed. Consequential matters and costs shall be adjourned for further consideration.